Supreme Court, U. S.
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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. • THIEL PRESS • (202) 638-4521

PETITION FOR CERTIORARI FILED JANUARY 7, 1977

CERTIORARI GRANTED MARCH 28, 1977

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APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 75-1409

United States of America

v.

John Mitchell, et al.

In re: National Broadcasting Company, Inc., et al., Appellants

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United States Court of Appeals
for the District of Columbia Circuit

No. 75-1410

United States of America

v.

John Mitchell, et al.

Warner Communications, Inc., Appellant

Date	Proceedings
1975	
April 25	Certified Original Record (no transcript)
June 24	Memorandum of position of Appellee, Harry Robbins Haldeman
1976	
Feb. 20	Argued before CJ Bazelon; MacKinnon, CJ and Robert H. Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation
Oct. 26	Opinion for the Court filed by Chief Judge Bazelon
Oct. 26	Dissenting opinion filed by Circuit Judge MacKinnon
Oct. 26	Judgment reversing and remanding case to the District Court
Nov. 5	Appellee's (Nixon) petition for rehearing and suggestion for rehearing en banc
Dec. 3	Per Curiam order that the petition for rehearing is denied; CJ Bazelon; MacKinnon, CJ and Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation
Dec. 3	Per Curiam order en banc that the suggestion for rehearing en banc is denied; CJ Bazelon; Wright McGowan, Leventhal, Robinson and MacKinnon, CJ
Dec. 9	Appellee's (Nixon) motion for stay of mandate
Dec. 10	Per Curiam order that the motion of respondent Nixon for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a

period of 30 days from the date of this order and during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution in accord with this Court's opinion of October 26, 1976; CJ Bazelon; MacKinnon, CJ and Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation; Circuit Judge MacKinnon would not remand the record

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 74-128

United States of America,

v.

John Mitchell, et al.

Date	Proceedings
1974	
Nov. 12	Application of National Broadcasting Company, Inc. and others for an order permitting movants to have access to and make copies of certain tape recordings; P&A; affidavit; c/m 11-12-74
Nov. 13	Application of Public Broadcasting Service to join the request of National Broadcasting Company, Inc.; c/m 11-13-74
Nov. 13	Affidavit of Fred Graham in support of Motion of National Broadcasting System,

Date	Proceedings
	Inc. for an order releasing certain tapes. c/ser 11-13-74
Nov. 19	Order directing Clerk of Court to transfer to Misc. Case No. 74-128, without refiling, the application, motion & all supporting papers filed by certain television & radio broadcasters in Crim. Case No. 74-110, and further directing that any person served with the application who desires to support or oppose so indicate by filing written notice with the Clerk of Court within seven (7) days from the date of this Order, & to submit with such notice in affidavit form any pertinent supporting information. Sirica, J.
Nov. 19	Order specially assigning Misc. Case No. 74-128 to Judge Gerhard A. Gesell for all purposes. Hart, C.J.
Nov. 19	Order directing the Clerk of Court to prepare a statement in affidavit form detailing the mechanical procedure followed during certain aspects of the trial in Cr. 74-110. Gesell, J.
Nov. 26	Affidavit of James F. Davey, Clerk of the United States District Court for the District of Columbia; c/s 11-26-74.
Nov. 26	Memorandum of the United States in response to application of Broadcasting Companies; c/m 11-26-74.
Nov. 26	Opposition of Richard Nixon to application of Broadcasting Companies for copies of Presidential Recordings; c/m

Date	Proceedings
	11-26-74. (app. Raymond G. Larroca 1320–19th Street, N.W. Suite 500, 20086)
Dec. 2	Application of Warner Communications, Inc. for permission to copy tape recordings in evidence; P&A; affidavit of Fred W. Friendly; affidavit of David H. Horowitz; request for oral hearing; c/m 12-2-74. (app. of Joseph A. Califano, Jr. and Richard M. Cooper, 1000 Hill Bldg. 20006)
Dec. 5	Memorandum & Order granting application of National Broadcasting Co., Inc., et al for the reproduction of certain tapes used in the trial in Criminal No. 74-110; suggestions as to an appropriate method for facilitating release of a copy of tapes to be submitted & filed with the Clerk of the Court by 1-3-75; setting for the directives to the Clerk of the Court; denying the opposition of said application by former President Nixon. Gesell, J.
Dec. 13	Corrected entry of 12-5-74, Memorandum & order holding in abeyance ruling on application of National Broadcasting Co., Inc., et al, for the reproduction of certain tapes used in the trial in Cr #74-110; Suggestions as to an appropriate method for facilitating release of a copy of tapes to be submitted & filed with the Clerk of the Court by 1-3-75; Setting forth directives to the

Date Proceedings

Clerk of the Court; Denying the opposition of said application by former President Nixon. Gesell, J.

Dec. 27 Memorandum of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS, INC., Radio Television News Directors Association, Public Broadcasting Service and Warner Communications, Inc. on implementation of the Court's memorandum and order of December 5, 1974; c/s 12-27-74.

1975

Jan. 8 Order denying all pending applications re tapes without prejudice and transferring matter back to Judge Sirica for any further action. Gesell, J.

March 6 Further hearing on application of movants for an order permitting movants to have access to and make copies of certain tapes pertaining to Cr. No. 74-110 argued and taken under advisement. (Counsel to submit supporting beliefs within one week). Sirica, J.

March 13 Memorandum of Richard Nixon on advisability of release of tape recordings during pendency of criminal appeals; Exhibit A; c/m 3/13/75.

March 13 Memorandum of National Broadcasting Companies, Inc., American Broadcasting Companies, Inc., CBS Inc., Radio Television News Directors Associa-

Date Proceedings

tion and Public Broadcasting Service pursuant to Request of Court, c/m 3/13/75.

March 13 Memorandum of Warner Communications, Inc. in support of its application to copy certain tapes; Affidavits (13); c/m 3/13/75.

March 14 Affidavit of Carol H. Falk; c/m 3/14/75.

March 19 Supplementary appendix to memorandum of Warner Communications, Inc. in further support of its application to copy the tapes received in evidence and played to the jury; c/m 3-19-75.

March 25 Correction of appendix to memorandum of Warner Communications, Inc. in further support of its application to copy the tapes received in evidence and played to the jury; c/m 3-25-75.

April 4 Memorandum Opinion and Order denying petitions of applicants for immediate access to tapes for purpose of making copies for public distribution without prejudice. Sirica, J.

April 23 Notice of appeal by National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., Radio Television News Directors Association and Public Broadcasting Service from Order dated April 4, 1975. mailed to William G. Hundley, John J. Wilson, William S. Frates, David G. Bress, James F. Neal, Herbert J. Miller, Jr. and Joseph A. Califano, Jr.

Date	Proceedings
April 23	Notice of appeal by applicant, Warner Communications, Inc. from Order of April 4, 1975. Copies mailed to William G. Hundley, John J. Wilson, William S. Frates, David G. Bress, James F. Neal, Herbert J. Miller, Jr. and Floyd Abrams.

APPENDIX B

October 2, 1974

Mr. Fred Graham
CBS News
2020 M Street, N. W.
Washington, D. C.

Dear Fred:

This comes in response to your letter of September 17th on behalf of yourself, Carl Stern and David Schoumacher.

I have carefully considered each of the three requests you made. As regards the first, I intend to file an order in the near future clarifying the order of March 1st which prohibits extra-judicial statements by subpoenaed witnesses. The clarification will relieve a witness from that restriction once he or she has been excused.

Concerning the transcripts of recorded conversations, I understand that the government intends to offer transcripts not as evidence, but as aids to the jury in listening to any tapes that may be admitted into evidence. Whether transcripts will be used in this manner is still an open question. In the meantime, I cannot respond to your request for copies.

Finally, I have consulted with various other judges of this court concerning the release of tape recordings that are introduced as evidence. I have enclosed a copy of a memorandum to me from Chief Judge Hart which describes the consensus of opinion on this subject among the judges, a consensus with which I agree. I have

therefore decided not to release any tapes or copies of tapes.

Sincerely yours,
/s/John J. Sirica

Enclosure
cc: Carl Stern
David Schoumacher
Sid Davis

APPENDIX C

United States District Court
for the District of Columbia
Washington, D. C. 20001

September 18, 1974

MEMORANDUM:

TO: Judge Sirica

Reference is made to your memorandum to me of this date, concerning Mr. Graham's request made on behalf of CBS, NBC and ABC that copies of any tape recordings admitted into evidence be made available to news media representatives during the trial. The purpose of this is to permit the news media to actually broadcast the tapes in question.

I have consulted with many of the Judges of this Court concerning your memorandum and I beg to advise you that we unanimously agree as follows:

1. The ultimate decision as to whether these tapes be made available or not must be up to the Trial Judge.

2. The most troublesome aspect of this proposal in many ways is that there would be played on the electronic media a precise reproduction of what occurred

in Court when the tape was played. We have staunchly opposed, as you know, any broadcasting of Court proceedings. In a sense, if we allow replay of what occurred in Court, it will be very difficult to explain why we will not let a tape recorder be used by a court reporter to replay the entire proceedings.

3. As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained.

/s/George H. Hart, Jr.
Chief Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and RADIO TELEVISION NEWS DIRECTORS ASSOCIATION.

APPLICATION OF NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., and Radio Television News Directors Association hereby move this Court pursuant to Rule 47 of the Federal Rules of Criminal Procedure for an Order permitting Movants to have access to and make copies of those tape recordings introduced in evidence and played to the jury in open court, in the above-entitled action, for the purpose of broadcasting said tape recordings to the public.

As grounds therefor your Movants assert that under the First and Sixth Amendments to the United States Constitution, they should be permitted to broadcast to the public such tapes as have been introduced in evidence, all of which is more fully set forth in the attached Memorandum of Points and Authorities, which is incorporated herein and to be read as a part hereof.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

Cahill Gordon & Reindel
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OF COUNSEL:

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CBS Inc.
Ralph E. Goldberg
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Radio Television News Directors Association
J. Laurent Scharff
Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD C. WALD

RICHARD C. WALD, being duly sworn, deposes and says:

1. I am the president of NBC News, the News Division of the National Broadcasting Company, Inc. ("NBC"). I make this affidavit in support of the application by NBC and other broadcasters for access to and the right to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial for the purpose of broadcasting the tapes to the public.

2. It has always seemed to me that journalism is less a profession than a skilled trade practised by men and women of varying talents, moved forward occasionally by journeymen of genius. And, within a broad range of developed tradition, it changes as technology changes—and as the laws change. There is a connecting, developing line that links all of us in this trade to scribes, to printers, to line-cut illustrators and to the pioneers in flash powder and in sound. Whatever medium we work in, we are aware of and shaped by the other media whose reports become part of the public consciousness of events.

3. Hand in hand with the development of how we practise our trade has been the development of the matter itself, the stuff we deal with. Journalism has a

more conscious sense today of being connected closely to history, to sociology, to science, than it ever had before. And in recent years, its role in relation to government has been at issue, both as to what is reported and how it is reported. We started our reporting of the courts more than two centuries ago, and, while there is great agreement that only the direst of necessity should keep even part of a trial hidden from the public, there are still areas of difficulty and question in the relations of the bench and the fourth estate.

4. In the course of the trial before the Court, the Court has necessarily begun to deal with new technologies that are not exactly defined in precedents. The *right* to reproduce a document from a court trial arose at about the same time as the *ability* to reproduce it in print. As the right became firmly established in the principle of open trial, the practice of using bits of the documentary evidence in reporting was widely followed. When technology went forward and photography became widely spread, a photograph introduced in evidence in a court could be reproduced in news reports of what happened—and indeed, photographs were so reproduced. If a statue became a piece of evidence, and anyone were interested in it, it could be reproduced for general distribution.

5. Now we have entered a new phase. This Court is dealing in audio tapes that are introduced in evidence presumably because they are spoken documents, at least as valuable as printed ones, carrying with them an accurate reflection of the tones and the expressive qualifies of the people who made them. (Indeed, there has been a suggestion that former President Nixon might be making a deposition on television tape which would be as close as we can now get to making a deposition in person.)

6. That evidence is reproducible. It serves the same purpose as other evidence that can be reproduced; it brings to the wider public an appreciation of what happened in the court and of what happened to bring the matter to court.

7. The case before this Court is of grave importance. Each part of it that can be reported fairly is of interest and consequence to the public. Those in the courtroom are privileged to hear evidence as it could never before be heard in previous centuries of court practice. It is easily reproducible for the public at large, the public that cannot attend the daily sittings. That it is more vivid in conveying the sense of what happened—as photographs are more vivid in some cases than is print—is not a reason *against* allowing it to be reproduced, but rather is an argument *for* allowing such reproduction and dissemination.

8. I am, of course, familiar with the rules prohibiting cameras and microphones in the courtroom. The present application does not, it seems to me, tread upon any of the grounds upon which such rules is based. For example, in the present trial the jury has been sequestered; it has already heard the exhibits sought to be broadcast; the exhibits in question do not involve live testimony of witnesses and therefore their broadcast could not conceivably lead to intimidation of witnesses nor contribute, in any sense, to a "circus" atmosphere in the courtroom. Indeed, I believe the broadcast of the exhibits in question could not in any way affect the present proceedings. What it could affect is the degree of public awareness and consciousness of the events about which this trial relates. That is, it seems to me, precisely what broadcast journalism should do, if it is permitted to do so. I most respectfully urge the Court to permit the

broadcast press to have access to and make copies of the tape exhibits for broadcast to the public.

/s/Richard C. Wald

[Verification and Certificate of Service
Omitted in Printing]

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

November 13, 1974

MEMORANDUM TO ALL ACTIVE JUDGES:

RE: U. S. v. John N. Mitchell, et al
Criminal No. 74-110

Attached hereto is an application of National Broadcasting Co., American Broadcasting Co., CBS, Inc. and Radio Television News Directors Association, filed in the above criminal case, requesting that they be permitted to copy the tapes admitted in evidence in the above case and to broadcast same.

Judge Sirica has previously denied such permission but has referred this application to me for action, stating that he does not have the necessary time to give it at the present time.

I deem that this matter presents a serious question of policy that should be determined by the whole Court. I have, therefore, referred the application to Judge Gesell for study and report at an Executive Session of the Court

to be held after Counsel for Defendants have had an opportunity to respond.

/s/George C. Hart, Jr.
Chief Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL CASE NO. 74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION and PUBLIC BROADCASTING SERVICE

APPLICATION OF PUBLIC BROADCASTING SERVICE

Public Broadcasting Service respectfully joins the application of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., and Radio Television News Directors Association, filed the

12th day of November, 1974 seeking an order permitting movants to have access to and make copies of tape recordings introduced in evidence and played to the jury in open court, in the above-entitled action, for the purpose of broadcasting said tape recordings to the public.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

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[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT OF FRED GRAHAM

FRED GRAHAM, having duly sworn, deposes and says:

1. I am CBS News Legal Correspondent, currently assigned to cover the Watergate cover-up trial, *United States v. Mitchell, et al.*, for CBS News. From 1965 to 1972 I was Supreme Court and legal correspondent for the New York Times.

2. In connection with my work as a journalist, I have been involved with approximately fifty trials, but I find that the Watergate cover-up trial is absolutely unique because of the White House tapes. Through them, the prosecution is presenting a complicated conspiracy case involving the former top leaders of the government, and is playing for the jury recordings of the actual conversations that were part of the alleged conspiracy.

3. If I were covering the trial for the New York Times, I could report it exactly as any other case—by quoting the words spoken on the tape, and by explaining inflections or pauses that seemed crucial to the meaning of what was said.

4. Also, if the crux of the case were visual, physical evidence, rather than statements recorded on audio tapes, I could present it effectively on television. Broadcast journalists are normally permitted to take physical evidence from the courtroom during recesses and photograph it outside, or we are given copies of documents or photographs. Thus, television was able to communicate vividly the evidence in the recent hearings before Judge Sirica on the 18-1/2 minute gap in the White house tape—by filming photographs introduced in evidence of Rose Mary Woods' demonstration of her accident with the recorder, and by filming the scraps of

brown paper used by the Secret Service to keep records of who had the tapes.

5. However, in perhaps the most important trial in this country's history from the standpoint of informing the public, I have found the broadcast media handicapped because of the crucial role of the tapes. As I listen to the tapes in the courtroom, I find that I understand Watergate in a way that I had never understood it before, even though I have reported almost exclusively on Watergate for the past eighteen months. The only way to try to convey this to the public in a broadcast is to attempt to copy the speakers' inflections as I quote them on the air—but this is so difficult and I am so unsure that I can do fairness to them all, that I have virtually abandoned it.

6. At present, would-be spectators are starting to line up outside the courthouse at midnight prior to the days when tapes are to be played. I estimate that about 1,300 of them will get to hear portions of tape during the course of the trial. I have interviewed some of them after listening, and all have said that they understand Watergate in a way they did not before.

7. It is my belief that the only way the Watergate cover-up case can be a truly public trial under these circumstances is for the tapes to be made available for copying, as physical evidence would be, so that it may be broadcast to the public.

/s/FRED GRAHAM

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 74-110

Miscellaneous No. 74-128

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

ORDER

It appearing that an application by certain television and radio broadcasters has been filed in this cause, and the Court having determined that applicants lack standing in this proceeding and that the matter should be treated as filed as a civil miscellaneous matter, now therefore it is

ORDERED that

(1) the application, motion and all supporting papers shall be transferred by the Clerk of Court to a miscellaneous number, without refiling; and

(2) any person served with the application desiring to support or oppose shall so indicate by filing written notice with the Clerk of Court within seven days from the date of this Order, and shall submit with such notice in affidavit form any pertinent supporting information.

/s/John J. Sirica
UNITED STATES DISTRICT JUDGE

November 19th, 1974.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, et al.

AFFIDAVIT OF
JAMES F. DAVEY

JAMES F. DAVEY, being first duly sworn, states as follows:

1. I am the Clerk of the United States District Court for the District of Columbia.

2. This affidavit is submitted in accordance with Judge Gesell's Order dated November 19, 1974, directing that the Clerk of Court: (1) prepare a statement detailing the mechanical procedures followed during the trial of *U. S. v. John N. Mitchell, et al.*, CR 74-110, in reproducing, playing to the jury, and receiving in evidence certain tapes; and (2) indicate any facts bearing on the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved.

3. To obtain information for this statement I consulted Todd Christofferson, Law Clerk of Judge Sirica; James Capitanio, Courtroom Deputy to Judge Sirica; George Frampton, Assistant Special Prosecutor; and Robert L. Halvorson, Professional Engineer (em-

ployed by the Office of the Special Prosecutor as a Consultant).

4. Mr. Christofferson, who has had access to and control over the tapes since they were subpoenaed, advised me that:

> White House tape recordings were submitted to the Court pursuant to two separate subpoenas. The first group of tapes were delivered in November 1973 and the second in July and August 1974. In each instance, the Court received what purported to be the entire reel of original recording on which was found any portion of a subpoenaed conversation.
>
> As the time for trial in *U.S. v. Mitchell, et al.*, CR 74-110, approached, the Court reproduced subpoenaed conversations from the original recordings, using technical assistance supplied by the Watergate Special Prosecutor. Portions of conversations and, in some cases, entire conversations which the Court had previously declared to be subject to privilege were not reproduced. Two copies of each conversation were produced simultaneously and were designated Copy A and Copy B. The Copy B series was delivered to the Special Prosecutor pursuant to the subpoenas aforementioned for use in the preparation of transcripts. Copy A series tapes were retained by the Court and later marked for identification as Government Exhibits in CR 74-110. These tapes are contained on about 50 separate reels.

In the Government's case at trial, some, but not all, of the Copy A series tapes were admitted into evidence. Some, but again not all, of the tape exhibits were published to the jury. Those published were played to the jury either in whole or in part. Where exhibits were not published in their entirety, the deletions had been made either by the Government on its own motion or pursuant to an order of

Judge Sirica. Deletions were effected not by modifying the exhibit itself, but by skipping deleted portions on the tape or by interrupting the sound transmission to the jurors' headphones. The exhibits remain as originally constituted.

The jurors were provided with transcripts of the tape recorded conversations for use as aids in listening to the exhibits. These written transcripts were marked for identification as Government Exhibits, and copies provided to the individual jurors, counsel, and news media representatives at the time the tapes were played. Deletions in the copies of transcripts used by the jurors and others matched precisely the deletions in tapes as they were published at trial.

In many instances the Copy A series tapes introduced as Government Exhibits contain material that has not been published to the jury and others present in the courtroom.

> Reproduction of those portions of tape exhibits played in Court could be made from the exhibits (the appropriate Copy A series tapes). The reproduction process would require playback and copying equipment and someone with sufficient technical expertise to operate such equipment. The process would also require the participation of someone sufficiently familiar with the exhibits to locate and identify published portions and who could be responsible to the Court for assuring that only such portions were copied.

5. Mr. Halvorson advised me that two professional recording machines would be needed to make a copy of the tapes played to the jury. One machine would be used to play back the tape played to the jury; the other machine would be used to make the copy. Two such machines (Ampex AG 600 B), which are on loan to the Office of the Special Prosecutor from the House

Judiciary Committee, are presently available. Mr. Halvorson would assist in reproducing the tapes for his standard consulting fee of $20.00 per hour or $100.00 per day.

6. Aside from possible consulting fees to Mr. Halvorson, the only other expense involved in reproducing the tapes would be the cost of reels of tape that would have to be purchased. Mr. Halvorson advised me that reels of the quality used during the trial cost about $4.00 to $5.00 per reel. Since the tapes introduced in evidence are contained on about 50 separate reels, and since not all such tapes were played to the jury, the maximum cost of the reels would be about $250.00.

7. Insofar as the time involved in reproduction is concerned, the total playing time of the tapes introduced in evidence is about 30 hours. The total playing time of that portion of the tapes actually played to the jury is somewhat less, perhaps 16 to 20 hours. To this time would have to be added the time involved in locating on a given tape that portion actually played to the jury. Thus, my best estimate of the time that would be involved in reproducing those portions of the tapes actually played to the jury is about five to seven days.

8. The reproduction process would involve "matching" the transcript of the tapes played to the jury with the related Copy A series tape. This "matching" process could be accomplished most expeditiously by a team made up of Robert Halvorson and either Todd Christofferson or George Frampton, the Assistant Special Prosecutor most familiar with the tapes. However, since both Mr. Christofferson and Mr. Frampton are devoting their full time to the trial in CR 74-110, I recommend that if the Court determines that the tapes should be reproduced now, then such reproduction be accomplished by Mr. Halvorson and one of my deputy clerks. I could make my Management Assistant, Helene Beale,

available for this purpose. With some initial guidance from Mr. Christofferson, Mrs. Beale could familiarize herself with the tapes and transcripts and could assure the Court that only those portions of the tapes actually played to the jury were copied.

/s/James F. Davey

[Verification Omitted in Printing]

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Crim. No. 74-110

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, et al.,

Defendants

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO APPLICATION OF BROADCASTING COMPANIES

The United States submits this memorandum in response to the motion of National Broadcasting Company, Inc., American Broadcasting Company, Inc., Columbia Broadcasting System, Inc., Radio Television News Directors Association, and Public Broadcasting Service for an order allowing them to make copies for

public broadcast of the tape recordings introduced into evidence in *United States v. Mitchell*, Crim No. 74-110 (D.D.C.).[1]

Although movants' suggestion that they have a constitutional right to duplicate the tape recordings is debatable,[2] the court has the inherent power to permit reproduction of the recordings if it determines that the process is consistent with the sound administration of justice and is in the public interest. As long as the rights of individuals involved are not affected, this determination is peculiarly within the discretion of the Court. The Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of

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[1]NBC, ABC, CBS, and Radio Television News Directors Association filed a written motion and request for a hearing on November 12, 1974. On November 13, PBS sought leave to join in this motion. A supporting affidavit was filed with the original request and another was submitted on November 13. Judge Sirica, the trial judge in the underlying case, who previously had denied permission to duplicate the recordings, referred the application to the Chief Judge.

[2]Contrary to movants' contention, refusal to allow duplication of the tape recordings in the midst of trial is not a classic prior restraint on speech or the press. This is not a case in which the government seeks to forbid the press from publishing information, *cf. New York Times Co. v. United States*, 403 U.S. 713 (1971), or to command the press to publish certain material, *cf. Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974). Rather, it is a "right of access" case. *Cf. e.g., Consumers Union v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 25 (D.D.C. 1973). Although commentators have disputed the proposition, *see, e.g., Note, The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505 (1974); *Note, The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838 (1971), the Supreme Court repeatedly has stated that the press has no greater right of access to information than the public, *see, e.g., Pell v. Procuniter*, 94 S. Ct. 2800, 2810 (1974); *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972); *Estes v. Texas*, 381 U.S. 532, 540 (1965).

the United States to a fair trial would be jeopardized if the motion is granted, and accordingly does not oppose the motion.[3]

Respectfully submitted,

/s/HENRY S. RUTH, Jr.
Special Prosecutor

/s/PETER M. KREINDLER,
Counsel to the Special Prosecutor

/s/JAMES F. NEAL,
Associate Special Prosecutor

/s/DAVID KAYE,
Assistant Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N.W.
Washington, D.C. 20005

Attorneys for the United States

DATED: November 26, 1974

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[3]Of course, if the motion is granted, there must be procedures to insure that the duplication process does not interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced into evidence. Because more than one copy of the recordings already exists, this should be no problem.

[Certificate of Service Omitted in Printing]

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

Plaintiff,

v.

JOHN MITCHELL, et al.,

Defendants.

OPPOSITION OF RICHARD NIXON TO APPLICATION OF NBC, ET AL, FOR COPIES OF PRESIDENTIAL RECORDINGS

Richard Nixon, through his undersigned attorneys, hereby opposes the application of the National Broadcasting Co., Inc., et al., for copies of the presidential tape recordings introduced in evidence in the case of *United States v. Mitchell, et al.*, Crim. No. 74-110, in order to play those tapes on radio and television. This opposition is submitted pursuant to the Order of the Hon. John J. Sirica, District Judge, dated November 19, 1974, permitting opposition by "any person served with the application" within seven days of that date.

Mr. Nixon has an interest in this proceeding in that the tapes sought by applicants were obtained by subpoena from him personally; they have been held by the Supreme Court to be subject to a privilege of confidentiality, asserted by Mr. Nixon, which was overcome in this case only to the extent the tapes were shown to be essential to enforcement of the criminal laws; and Mr.

Nixon's voice appears on each of the tapes, in the course of private conversations with his aides. Mr. Nixon's personal interest has nothing to do with any possible effect of the broadcast of the tapes upon the pending criminal trial before Judge Sirica, and no such questions are discussed here. The basis for this opposition is that broadcast of the tapes by the applicants will have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others whose voices appear on the tapes in candid conversations never intended to be publicly aired, and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein, often in the kind of blunt and offhand remarks common in private conversations among close associates but which do not necessarily represent considered judgments and which would not be made publicly. These effects will be far more severe than any that have occurred thus far, and are totally unnecessary to and unjustified by the purpose for which production of these recordings was initially compelled by this Court.

I.

THE RELIEF REQUESTED BY THE APPLICANTS WOULD FURTHER INTRUDE ON THE PUBLIC AND PRIVATE INTERESTS IN THE CONFIDENTIALITY OF THE RECORDINGS.

Each of the recordings involved in the application were initially subpoenaed by the Special Prosecutor for use in grand jury proceedings or criminal trials, and were the subject of claims by Mr. Nixon of presidential privilege. The privilege was held applicable by every court that considered the matter, but was held to be overcome by, in the language of the Supreme Court, a "demonstrated,

specific need for evidence in a pending criminal trial." *United States v. Nixon*, __ U.S. __, 94 S.Ct. 3090, 3110 (1974). In their opinions, however, both the Supreme Court and the Court of Appeals emphasized the injury likely to occur by any inroad on the confidentiality of the privilege, and the necessity of limiting the intrusion to the minimum necessary to fulfill the compelling purpose for which the privilege was held to yield. Furthermore, the Supreme Court noted that the *privacy* of those whose voices appeared on the tapes was one consideration underlying the privilege. The Court stated, 94 S.Ct. at 3107 (emphasis added):

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference *for the privacy of all citizens* and added to those values *the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking.* A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions *and to do so in a way many would be unwilling to express except privately.* These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

The Court of Appeals in *Senate Select Committee v. Nixon*, __ U.S. App. D.C. __, 498 F.2d 725, 729-730 (1974), stated much the same reasoning:

> [P]rotection of the presidential decisionmaking process requires a promise that, as a general matter, its confidentiality would not be invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment.

Obviously, the conversations that were confidential at the time the privilege was asserted are no longer confidential insofar as they have been played publicly during the Watergate criminal trial and excerpts thereof printed and broadcast by news media. That does not mean, however, that all the interests in privacy recognized by the Supreme Court and the Court of Appeals have disappeared. Indeed, any such contention by the applicants in this case would directly contradict the very basis upon which they rest their claim. For if no further exposure of the conversations is involved beyond what has already occurred, then concomitantly no further purpose of "informing the public" can be asserted.

There is no need, we trust, to review here the nature of the conversations on the tapes. Wholly putting aside the substance of the conversations as they relate to the Watergate affair, they contain exactly the kind of blunt, candid, and even profane remarks that one might expect in a recording of a conversation among close associates none of whom contemplated public airing of his words: Some of the remarks are embarrassing to other individuals—even to heads of foreign states[1]—and some reflect opinions perhaps not well-considered by the speaker, but as to which he will not have any opportunity for correction or explanation remotely approaching the kind of exposure given to the tapes.

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[1]Interestingly, the Supreme Court anticipated this very problem and was careful to emphasize the sensitivity of the material in this regard. *United States v. Nixon, supra*, 94 S.Ct. at 3111: "The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment."

Our point here is not that the injury that will plainly occur to the participants and other persons mentioned in the conversations, as well as to the public interest to the extent that remarks offend others whose goodwill is essential to the welfare of this nation, would be sufficient to authorize an injunction by a court against reporting of such conversations, by broadcast media or otherwise, as they are played in the courtroom for the purpose of the Watergate criminal trial. That, however, is not the issue here. Our point is simply that the broadcast of the tapes *will invade* the interests of Mr. Nixon and others, and thus cannot be permitted when, as here, the applicants have shown no *right* to the relief they seek.

II.

THE TAPES ARE IN THE CUSTODY OF THIS COURT UNDER SUBPOENA FOR THE PURPOSE OF A CRIMINAL TRIAL AND FOR NO OTHER PURPOSE.

That the recordings are in the custody of this Court not for the purpose of "informing the public," but solely and exclusively for the purpose of determining the guilt or innocence of defendants in a criminal trial now being conducted before a jury, seems too plain to require discussion. The Supreme Court in *United States v. Nixon, supra,* repeatedly emphasized that the sole consideration justifying an order against the President to produce the presumptively privileged materials was "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . ." 94 S.Ct., at 3107. See also *id.* at 3109. The Court added that in determining whether particular materials should be produced, it is incumbent on the Court to "afford presidential confidentiality *the greatest protection consistent with the fair administration of justice.*" *Id.* at 3111 (emphasis added).

Though the applicants rely in part on the Sixth Amendment guarantee of a "public trial" as purported grounds for their application, there is and can be no real suggestion that broadcast of the tape recordings is necessary to the "fair administration of criminal justice." Indeed, Mr. Wald, in his affidavit attached to the application, states that "broadcast of the exhibits in question could not in any way affect the present proceedings." The sole purpose of the application is said to be to enable the applicants to "provide news coverage of this extremely significant trial in the manner which best fits the distinctive abilities of broadcast journalism." (Memorandum of Points and Authorities in Support of the Application, p. 1.) That provides a *reason for making* the application; but it provides no *authority* for the relief requested. The relief is totally unrelated to the sole purpose for which the tapes were ordered produced. To establish a right to broadcast the tapes, the applicants cannot rely on the fact that they have been disclosed for the purpose of a criminal trial. Where the privacy of individuals is involved, the courts have no more power than does Congress to "expose for the sake of exposure." *Watkins v. United States,* 354 U.S. 178, 200 (1957); see also *Hentoff v. Ichord,* 318 F.Supp. 1175, 1181 (1970). The applicants must show some independent legal basis for the relief they seek. This they have failed to do.

III.

APPLICANTS HAVE NO CONSTITUTIONAL RIGHT TO COPY AND BROADCAST THE TAPES.

The fallacy of applicants' constitutional argument is illustrated by their starting proposition: that there exists a "ban" on broadcasting which constitutes a "prior restraint" on freedom of the press. There is no such ban. The applicants' inability to broadcast the tapes is not due to any restraint imposed by the Court or by law on what

is published or how it is disseminated, and the trial is as fully public as a trial can be. The applicants' problem is their lack of the tapes themselves or copies thereof. That lack—which is shared by the applicants with everyone else except the Court, which has them because of the necessity held by the Supreme Court to be a basis for their production—no more constitutes a prior restraint on the press than does their lack of any other materials in the possession of any branch of the government which the applicants might be interested in broadcasting.

According to the argument of the applicants, any restriction on *access* to material which they wish to use for news purposes would amount to a prior restraint on their freedom bearing a "heavy presumption of unconstitutionality." That theory has recently been squarely rejected by the Supreme Court. In *Pell v. Procunier*, __ U.S. __, 94 S.Ct. 2800, 2810 (1974), the Court held that newsmen have no right of access under the First Amendment to "information not available to the public generally." The Court stated, *id.*"

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, *supra*, and that government cannot restrain the publication of news emanating from such sources. Cf. New York Times v. United States, *supra*. It is quite another thing to suggest that the Constitution imposes on government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

See also *Saxbe v. Washington Post Co.*, __ U.S. __, 94 S.Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-685 (1972).

The applicants have every right of access to the tapes which is afforded the public generally. Indeed, they, along with members of the print media, have been afforded special privileges by the Court to enable them most effectively to cover the Watergate trial. What they seek is not the lifting of any restriction on their activities, but an additional special privilege not granted to members of the public: their own copies of the tapes. It is only by refusing to acknowledge this distinction that the applicants are able to cite in their argument the wealth of cases which properly have struck down injunctions, orders and other forms of restraints on the conduct of the press in its coverage of criminal trials which were not supported by compelling interests of fairness in the administration of justice.[2] Each and every one of those cases involved an affirmative restriction on the activities of the press, rather than a claim by members of the press of entitlement to a special privilege; and each, therefore, is inapplicable to the present case.

Finally, the contention that the Sixth Amendment's guarantee of a public trial affords to the applicants a constitutional right to copies of the tape recordings is wholly untenable. The applicants concede, as they must, that the Court has not "in any sense, conducted this trial in a secret or closed manner." (Memorandum of the

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[2]*E.g.*, *Craig v. Harney*, 331 U.S. 367 (1947) (newsmen may not be convicted of criminal contempt for editorials critical of trial judge's handling of case); *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974) (vacating order of trial court prohibiting courtroom sketching or publication of sketches); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (holding unconstitutional a court order barring newsmen from reporting details of evidence at hearing); *Times-Picayune Publishing Corp. v. Schulingkamp*, 43 U.S.L.W. 2046 (U.S.Sup.Ct. July 29, 1974) (stay granted of order prohibiting reporting of testimony at pre-trial hearing until after jury selection).

Applicants, p. 11.) Indeed, it is no overstatement to say that this trial has been more intensively and thoroughly covered by every news medium than any other trial in the nation's history, including the printing of entire tape transcripts and the broadcast, together with televised transcripts, of the portions deemed most newsworthy by the applicants and others.

The airing of copies of the tapes themselves, while no doubt providing a novel and intriguing experience to some listeners and views—along with a painful experience for some whose voices appear or who are mentioned in the conversations—is hardly necessary to fulfill the purposes of the Sixth Amendment guarantee, any more than it is necessary to have a representative of the press present at bench conferences. The public is entitled to "be informed about criminal prosecutions," *United States ex rel. Mayberry v. Yeager,* 321 F.Supp. 199, 204 (D.N.J. 1971), just as it is entitled to know about conditions in state and federal prisons. Cf. *Pell v. Procunier, supra,* 94 S.Ct. at 2802. But the press is not thereby entitled to privileges deemed by it to be useful in covering the trial "in the manner which is most appropriate for its medium." (Memorandum of the Applicants, pp. 2-3.) We submit that the Sixth Amendment, like the First, provides no authority for the relief requested by the applicants, and in view of the injury to others that such relief would entail, the application must be denied.

Respectfully submitted,

/s/Herbert J. Miller, Jr.

/s/Raymond G. Larroca

/s/William H. Jeffress, Jr.

/s/R. Stan Mortenson

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APPENDIX K

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et. al.,

Defendants.

Criminal Case No. 74-110

IN RE WARNER COMMUNICATIONS, INC.

APPLICATION OF WARNER COMMUNICATIONS, INC. FOR PERMISSION TO COPY TAPE RECORDINGS IN EVIDENCE

Warner Communications, Inc., by undersigned counsel, hereby respectfully moves this Court, pursuant to Rule 47 of the Federal Rules of Criminal Procedure, for an Order permitting it and its wholly owned subsidiaries to

have access to and copy those tape recordings introduced into evidence and played to the jury in open court in the above-captioned case, for the purpose of disseminating those tape recordings to the public by means of phonograph and tape recordings.

This application is made pursuant to the First and Sixth Amendments to the Constitution of the United States and, alternatively, on non-constitutional grounds. The reasons in support of the application are set forth in the accompanying Memorandum of Points and Authorities in Support of Application of Warner Communications, Inc. for Permission to Copy Tape Recordings in Evidence.

Respectfully submitted,

/s/Joseph A. Califano, Jr.

/s/Richard M. Cooper

WILLIAMS, CONNOLLY & CALIFANO
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(202) 331-5000

/s/Sidney Rosdeitcher

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York

[Caption Omitted in Printing]

AFFIDAVIT OF FRED W. FRIENDLY

FRED W. FRIENDLY, being sworn, states:

1. I am Edward R. Murrow Professor of Broadcast Journalism at the School of Journalism, Columbia University. I am also an adviser on television to the Ford Foundation. I was associated with the radio and television industry from 1938 to 1966. I have had considerable experience with the use of audio and visual means for recording historic events. From 1964 to 1966 I was President of CBS News; prior to that I had been executive producer of the documentary news program, CBS Reports. I collaborated with Edward R. Murrow in an aural history of the period 1932-1950, recorded under the title *I Can Hear It Now*, and I collaborated with Walter Cronkite in the production of a similar recording for the 1960s entitled *I Can Hear It Now-The Sixties.* Mr. Murrow and I also produced an aural autobiography of Winston Churchill.

2. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public.

3. I believe that recordings of the type which WCI proposes to make and disseminate will result in a unique contribution to public understanding of the momentous events generally referred to as Watergate. An aural record of the taped conversations heard by the jury in this case is far superior to the printed record of those conversations which has already been made available through newspapers and television. The cold printed record of

those conversations cannot possibly convey the true and full story they tell. That story can only truly be known by hearing the words spoken by the participants themselves—and hearing their inflections and their tones of voice, and the equally significant interjections of pauses and silences.

4. As a participant in the creation of aural history I believe I can attest to the importance to public understanding and to history of an aural record of certain events such as those now before the jury in this case. Surely, for example, the real truth about the confrontation between Chambers and Hiss, or about the Army-McCarthy hearings, and the famous exchange between Senator McCarthy and Joseph Welch, or about the historic Senate Foreign Relations Committee Hearings on the Vietnam War, could not fully be known and evaluated by the public or by history without actually hearing the recorded words of the participants. Certainly the public and future historians would be greatly deprived of an opportunity to learn the true facts about Watergate if the White House conversations—already recorded in print and heard in open court—were not readily accessible through an aural record such as the one WCI proposes to make.

5. The broadcast dissemination of the conversations played to the jury will undoubtedly be a major contribution to the education and enlightenment of the American public. But as a teacher of journalism, as one who has spent all of his professional life as a broadcast journalist and as a participant in other projects for recording aural history, I can state that phonograph and tape recordings of those conversations for dissemination to the public for use in their homes, in their schools and in their libraries will be an even greater contribution to public understanding of these events. Broadcast dissemination will give the public an immediate but somewhat transient exposure to the truth about these events which have so affected our nation for the last two years. Phonograph recordings and tapes will permit the public and scholars to ponder these events in the deliberate manner that they deserve and to contemplate their significance for our society and our political system. They will provide a more lasting and more widely accessible record for this and future generations.

6. This affidavit has been submitted in response to an invitation by WCI and it is my judgment that the public interest for fully understanding these events will best be served by granting WCI's application and permitting them to disseminate phonograph recordings and tapes of the conversations which the jury—as well as spectators and the working press—have already heard. But I should also like to express my concern over the long-term implications of this matter for the public and particularly for journalists and historians of future generations. They will return to this recorded history with a perspective different from ours. They will require access to the unabridged, unedited tapes of the conversations played to the jury. I would urge that necessary steps be taken now to insure that archives at universities and other libraries will have the opportunity to incorporate all of this material in their permanent collections.

/s/Fred W. Friendly

[Verification Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID H. HOROWITZ

DAVID H. HOROWITZ, being sworn, states:

1. I am Executive Vice President of Warner Communications Inc. ("WCI"). I am the principal officer of WCI responsible for overseeing on a corporate level the operations of those subsidiaries of WCI in the phonograph record and tape business. Before holding this position, I was for ten years Vice President and General Counsel of Columbia Pictures Inc. In these capacities and prior to that as an attorney, I have had broad experience in the motion picture, record and cable television industries. I make this affidavit in support of the application by WCI for access to and the right to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial. WCI seeks such access so that it may make phonograph and tape recordings of those tapes for dissemination to the public.

2. Warner is a diversified company principally engaged in the communications business. It is a leading manufacturer of phonograph records and tapes through its subsidiaries Warner Bros. Records Inc. ("Warner Records") and Atlantic Recording Corporation ("Atlantic"), and its Elektra/Asylum/Nonesuch Division ("Elektra"). Through a network of branch distribution offices throughout the United States and in many foreign countries, WCI subsidiaries distribute these records and tapes all over the world. Through other subsidiaries, WCI is also a major producer and distributor of motion pictures and television programs (Warner Bros.); a leading operator of cable television systems throughout the United States (Warner Cable Corp.); a publisher of paperback books (Warner Paperback Library); and a distributor of magazines and periodicals (Independent News Company).

3. The proposal of the broadcast media to afford the American public the same access to the tapes already available to those who attended the trials is a commendable one. WCI makes this separate application because we believe that through the media of phonograph records and tapes we can provide the American public with an even better means for fully understanding these historic events. The broadcast media can give to the public immediate and contemporary knowledge of these events, but only phonograph records and tapes can fix the record of these events in an enduring fashion which can be deliberately contemplated, studied, and reviewed by this and future generations of Americans in their homes, schools and libraries.

4. The newspaper and publishing industry has already begun to perform this task through the media of print. Bantam and Dell have published the stenographic record of the tapes released by the White House. Newspapers have already printed large portions of the stenographic record of the tapes played to the jury in this case, and the publishing industry is free to, and undoubtedly will, publish in book form the full stenographic record of the tapes. But it is now commonly accepted that the true significance of the words spoken on the tapes can only be grasped by hearing the tones and inflections of the speakers and the pauses and silences which, no less than the words themselves, convey the true meaning of the speakers. Surely, if the general public is allowed access to the conversations through the media of the printed word, it is even more important the public have access to the fuller, more accurate record which captures the added, indeed critical, dimension of the actual sound of the conversations.

5. The affidavits of the Clerk of the Court shows that the copying of the tapes for the networks can be

accomplished with full protection for the physical safety of the tapes themselves, with little burden to the Clerk's office, and with no intrusion or disruption of the Court proceedings. Granting WCI's application would involve no additional burden or disruption. We would propose that the copies we seek be made at the very same time and by the same procedures as the copies being made for the networks. This could easily be done, for example, by arranging for WCI to share with the networks the cost of making a single master tape of those portions of the tapes heard by the jury. Additional copies could then be made for the different applicants from this master tape.

6. WCI believes that the conversations heard by the jury and the public in open court should receive the widest possible dissemination to the American public in a form which most faithfully preserves their accuracy for future understanding. Accordingly, we respectfully request that the Court grant WCI's application.

/s/David H. Horowitz

[Verification and Certificate of Service Omitted in Printing]

APPENDIX L

Memorandum and Order of Judge Gesell, dated December 5, 1974

(located at 36a-43a of Petition for Certiorari)

APPENDIX M

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN D. MITCHELL, ET AL.

IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS, INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; PUBLIC BROADCASTING SERVICE; and WARNER COMMUNICATIONS, INC.

MEMORANDUM OF APPLICANTS, NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS, INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, PUBLIC BROADCASTING SERVICE, AND WARNER COMMUNICATIONS, INC., ON IMPLEMENTATION OF THE COURT'S MEMORANDUM AND ORDER OF DECEMBER 5, 1974

This memorandum is submitted on behalf of all of the applicants before the Court in response to the Court's Memorandum and Order of December 5, 1974 calling for suggestions concerning dissemination of the tapes in evidence in accordance with the considerations set forth therein. Our proposal is in two parts: the first concerns the making of a single master set of reels to be used for further copying; the second concerns the making of copies from the master set.

We suggest that the Court appoint a deputy clerk or some other person to carry out the administrative tasks necessary for the implementation of the Memoerandum and Order of December 5 and consistent with the procedure set forth herein.

Our basic conclusion is that there are no obstacles, technical or otherwise, to the reproduction of the tapes and their public dissemination.

I. MAKING THE MASTER SET OF REELS

Our suggestions for the preparation of the master set of reels are based upon the submissions set forth in the Affidavit of James F. Davey, Clerk of the Court, previously filed in this case. It is our firm understanding that, from an engineering or technical perspective, the process of making a master set of reels is a simple one.

The master set of reels may be made by dubbing (copying) either the Court's copy of the tapes (Copy A) or the Special Prosecutor's copy (Copy B). Mr. Davey has suggested that Copy A be used, and we support the suggestion. However, if Copy B is also available, it would be an entirely satisfactory alternative.

We propose that the technical expert in charge of the dubbing be David Kaye and his associates, who made the original copies (A and B) of the White House tapes. We have confirmed that Mr. Kaye will be generally available whenever called upon. Mr. Kaye is associated with BBN Engineering, 50 Moulton Street, Cambridge, Massachusetts (617-491-1850). BBN is a firm headed by Dr. Richard Bolt, who served on Judge Sirica's Advisory Committee on White House tapes. We suggest that BBN be authorized to make a true and accurate master copy of the tapes.

We join Mr. Davey's suggestion that the engineer work together with someone whose function is to protect the Court's interest in ensuring that only portions played to the jury are copied onto the master reels.

The dubbing should be carried out with broadcast-type equipment. Many adequate brands are available. However, Mr. Kaye has readily available portable Nagra #3B or 4L machines and incidental equipment, which he used to make Copies A and B; and, accordingly, we suggest that those machines be used. We are advised that the master reels should be a series of 30-minute seven-inch reels played at a speed of 7.5 inches per second (IPS), monaural, and using standard NAB equalization. We propose the speed of 7.5 IPS because tapes of speech are normally played by the broadcast media at that speed. The tapes were played to the jury at a speed of 3.75 IPS. However, during the dubbing, the machine playing the original could be run at 3.75 IPS, and the copying machine could be run at 7.5. The difference in speed would not present any risk to the original tapes.

We have no entirely reliable figure for the number of reels needed for the master set. Our best estimate is that approximately 40 will be required (based on an estimated playing time of 18-22 hours).

We suggest that the transfer be carried out in a room in the courthouse, possibly the room used in making Copies A and B. We are advised that it should take less than one week. The present applicants are prepared to bear (and share among themselves) all costs of making the master set of reels, including consulting fees, rental of equipment, purchase of tapes and reels, etc.

We have two additional suggestions which we believe would contribute significantly to the integrity, accuracy, comprehensibility, and historical value of the copies. First, the segments of conversations should be copied in

chronological order rather than in the order in which they were played to the jury. This proposal will not complicate or delay the dubbing process. Second, a microphone should be placed in the circuit to enable the engineer to slate (announce) on the master reels the identification of each segment of conversation—by reference to either the date, time, location and participants, or to the transcript page and paragraph numbers, or to both.

II. MAKING COPIES FROM THE MASTER SET

The master set should be hand delivered, under court supervision, to the firm or agency that will carry out the duplicating to individual orders.

We suggest that one of the many reputable private firms experienced in the duplication of tapes be authorized by someone acting on behalf of the Court to carry out that function. There are several such firms which have a sufficient number of machines (called in the trade "slaves"*) to carry out multiple duplicating at a rapid rate and for a reasonable price. We are prepared to furnish to someone appointed by the Court suggestions as to specific firms that could carry out this function. The ultimate choice should be governed by five criteria: that the firm be reputable, that it be experienced, that it have adequate capacity (a minimum of ten "slaves", though the more the better), that it not be associated with any firm that produces or distributes tapes or records for sale to the public, and that it charge a reasonable rate (the lower the better).

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*The "master" is the machine that plays the original tape from which copies are being made. The "slaves" play the blank tapes that become copies. For purposes of this type of duplication, both master and slaves are run at a faster rate of reproduction.

Alternatively, we suggest that someone acting on behalf of the Court contact government agencies having the technical capability for multiple reproduction of the tapes. Our information is that the United States Information Agency and the United States Marine Corps each have the capability.

Assuming a tape playing time of approximately 20 hours, we estimate that each ten "slaves" working an eight hour day could produce duplicate sets of tapes at the rate of 15 per day. We are advised that the price per reel would likely range between $2.20 and $4.00, depending on the total number ordered by all purchasers. As the number ordered increases, the price per reel would approach approximately $2.20, probably somewhere beyond 1000 sets. Handling and mailing charges would be additional. Since we cannot predict how many sets will be ordered, it may be necessary to assume a distribution of, say, 100, and quote a price on that basis with a clear indication that there may be a refund, depending on the total number of sets ordered.

We propose that upon completion of the master set of reels a public notice describing the copying process be distributed to the press. It is fair to assume that press reports will provide more than adequate publicity to potential purchasers. In addition, if the General Services Administration, the Department of Justice or some other agency is prepared to do so, a notice might be inserted in the Federal Register over its name. The notice should include the name and address of the firm or agency making copies (as the place to which orders should be sent), the total price per set (with an indication of possible refund, depending on the number of sets ordered), a direction that all orders be accompanied by check or money order (including a stated amount for handling and mailing if the set is not to be picked up

personally), a description of the distribution schedule, a specific deadline for mailing purchase orders, and a specific deadline for participating in the initial distribution.

The distribution process should satisfy two overriding interests, both of which have a constitutional dimension. The first is that the tapes be disseminated to the public promptly. Each day of delay postpones the informing of the public by the most effective means available. The second interest is that all persons who desire to purchase sets of the tapes have a reasonable and equal opportunity to do so. In order to accommodate both interests, we propose a two-stage distribution process. The first stage should last five (or, perhaps, ten) days, and end with an initial distribution of tapes to all those who have placed orders during that period. We anticipate that the purchasers during that period will include, but not be limited to, the major media of communications, who will thus be able to make an early dissemination of the tapes to the entire public. After the initial distribution to the earliest applicants on the same day (and thus on a fair and equal basis), orders should continue to be taken for a reasonable period—say, six weeks or three months (or for an additional period if demand warrants). Distributions during this second stage could be made at stated intervals, or on a first-come-first-served basis, or on some other equitable basis. This second stage would provide an adequate opportunity for all persons interested in purchasing sets of the tapes at a low price to do so.

The firm or agency would prepare and package the requisite number of copies and make them available to all purchasers (to be picked up or mailed out), and the initial recipients would all receive their copies on the same day.

During the process of making copies, the duplicating engineer would hear only the first few seconds of each

master reel to assure that there is a signal available, and since the transfer to the blank tapes would take place at high speed he would hear nothing further that would be recognizable.

Upon completion of the copying, the master set of reels should be returned to the Court, for donation to the Library of Congress or the National Archives, or such other disposition as the Court finds appropriate.

CONCLUSION

In this Court's Memorandum and Order of December 5, 1974, it invited suggestions as to the appropriate method for facilitating the release of the tapes in a manner consistent with the considerations set forth therein. We believe that the suggestions set forth herein are consistent with the Court's guidelines, and that they should be embodied in an Order, a copy of which is attached, which will permit both prompt and wide dissemination of the tapes to the public without priority or unfair advantage to anyone.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

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APPENDIX N

Order of Judge Gesell,
dated January 8, 1975

(located at 44a-45a of
Petition for Certiorari)

APPENDIX O

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF WILLA K. BAUM

STATE OF CALIFORNIA)
: ss.:
CITY OF BERKELY)

WILLA K. BAUM, being first duly sworn, deposes and says as follows:

1. I am department head of the Regional Oral History Office, a department of The Bancroft Library of the University of California at Berkeley. The Bancroft Library is a historical manuscript library specializing in documentation of western America. The Regional Oral History Office is one of the earliest oral history offices in the United States, having been established in 1954. The office tape records and prepares transcripts of interviews with persons who have contributed significantly to the development of the West and the nation. Approximately 40,000 pages of transcript have been completed and made available for scholarly research in the Bancroft Library, and one or more transcripts have been deposited in 160 manuscript libraries throughout the world.

2. I have been employed by the oral history office since its founding in 1954. Previous to that I studied American history and graduated from Whittier College, B.A. 1947; Mills College, M.A. 1950; and did further graduate work at the University of California, Berkeley in California history.

3. I have been actively engaged in the development of techniques and ethics of oral history since 1954. I was a member of the small group of oral history practitioners who met at Lake Arrowhead, California in 1966 to discuss formation of a national oral history association, and I was elected to the first council of the newly formed Oral History Association in 1967. I have written numerous articles on oral history, have participated in oral history training workshops, in Oral History Association Colloquia, and am the author of the widely-used *Oral History for the Local Historical Society* (1969, 1970, 1971, The American Association for State and Local History).

4. This affidavit is based on my own experience and belief in the values and proper techniques of oral history.

I do not speak as a representative of the University of California at Berkeley.

5. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public. I am particularly concerned that those tape recordings be made available to historical manuscript libraries for permanent preservation and use by scholars.

6. I would like to attest to the value for scholarly research of the actual sound recordings of historical events or accounts of historical events. Even though verbatim transcripts have been made of these recordings (and it is not possible in most cases to make a transcript that all hearers will agree is exactly verbatim), the sound recordings still contain evidences of feeling, emphasis, uncertainty or certainty that will be helpful to scholars in many fields in evaluating the significance of the statements.

7. In the case of the Nixon-White House tapes, it is clear from the variant wordings of the transcripts of some of the recordings, and in the number of ambiguous sounds that have been transcribed more-or-less phonetically, that any clear understanding of what took place requires access to the tape recordings themselves. It therefore seems important that the sound recordings be made available to the public under the same conditions as the transcripts.

8. This affidavit has been submitted in response to an invitation by WCI. I wish to add my recommendation to that of other oral historians and scholars that WCI be permitted to make the Nixon-White House tapes, of which the transcripts are already available, available to

the public. In particular, that steps be taken to preserve and open these materials for scholarly research.

/s/Willa K. Baum

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 74-110

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT

State of California)
: ss.:
County of Los Angeles)

FAWN M. BRODIE, being sworn, states:

1. I am Fawn M. Brodie, Professor of History at the University of California at Los Angeles. I am an historian and biographer, the author of four biographies, the most

recent of which are *The Devil Drives, a Life of Sir Richard* F. Burton (Norton, 1967), and *Thomas Jefferson, an Intimate History* (Norton, 1974). I have been teaching history at U.C.L.A. since 1967, my special field being the history of the American presidency.

2. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during the Water-gate coverup trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public.

3. The special value of the spoken word for training in history has been increasingly recognized in recent years. Oral history collections are now routinely used in universities all over the nation, and these collections are constantly being augmented. The use of tapes in history classes promises to become common as tapes and records become more generally available.

4. Professors of history at U.C.L.A. frequently use films to give a more vivid sense of the reality of the past. We encourage students to watch great documentary films like the B.B.C.-produced "The World at War," which has been available to public television in the United States for the past two years. The deep-throated voice of Churchill, with the faintest trace of a stammer, making his memorable speech about "blood, sweat, and tears," if listened to even without the visual image of the bulldog thrust of the jaw, conveys the strength and courage of this great leader almost as much as the words themselves. The hatred and contempt he felt for the Nazis is communicated in his very pronunciation of the word "nazis." There is no way of describing this contempt and hatred to students quite so effectively as by allowing them to hear the words from his own lips.

5. Similarly, the fireside chats of Franklin Roosevelt convey a jauntiness of temperament, an elevation of spirit, a sense of hope and optimism, that is partly lost if one reads these speeches rather than listening to them.

6. For students trying to understand the psychopathology of Adolf Hitler, it is absolutely essential that they hear the strident screaming of his speeches.

7. In my own writing of men in the past, particularly Thomas Jefferson, I wished many times that I had available a tape of one of his committee meetings, where his genius is said to have had special impact, or a tape of his first great inaugural address, said to have been delivered in such a low voice that it was heard by only the listeners in the first rows of the audience. We know of his magical gift for friendship only from the letters and memoirs of his friends.

8. As far as the tapes of Richard Nixon are concerned, I believe most profoundly that these should be made available to the American people. Members of Congress have already been permitted to hear many of them, and to judge for themselves exactly what was said during a conversation, when there was controversy over specific words. A nuance of expression, when listened to, can convey exactly whether words are spoken seriously, ironically, or in jest. In the case of the Nixon tapes, where there is so much controversy over specific words, it is imperative that historians and students be allowed to listen to the tapes over and again, so as to catch the inflections of voice which are essential to end the controversies arising out of the printed versions. In certain important instances, only repeated hearings can clarify exactly not only what was said, but also the spirit

in which it was said. By having access to these tapes the historian can be more faithful to the truth.

/s/Fawn M. Brodie

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS, INC.

AFFIDAVIT OF JAMES MACGREGOR BURNS

STATE OF MASSACHUSETTS)
: ss.:
COUNTY OF BERKSHIRE)

JAMES MACGREGOR BURNS, being first duly sworn, deposes and says:

1. I am Woodrow Wilson Professor of Government at Williams College, where I have been a member of the

Political Science Department since 1941. I am also President-Elect of the American Political Science Association. My principal field of scholarly interest is political leadership. I am the author of numerous articles and the following books: CONGRESS ON TRIAL (1949); GOVERNMENT BY THE PEOPLE (with Jack W. Peltason) (1951-1971); ROOSEVELT: THE LION AND THE FOX (1956); JOHN KENNEDY: A POLITICAL PROFILE (1960); THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP (1966); ROOSEVELT: THE SOLDIER OF FREEDOM (1970); UNCOMMON SENSE (1972). My 1970 book on Franklin Roosevelt was awarded the Pulitzer Prize, the National Book Award, and the Francis Parkman Prize for 1971.

2. During World War II, I served in the Pacific as a combat historian, and took part in the invasion of Saipan, Guam and Okinawa. I have served as a staff member of the Hoover Commission, and with other government agencies and committees.

3. During the course of my scholarly research, I have used oral source materials on a number of projects, including my biographies of Franklin Roosevelt and John F. Kennedy.

a. In preparing my biography of Franklin Roosevelt, I found it especially useful to listen to recordings even when I had accurate transcripts. For example, one cannot comprehend the gravity of the situation on March 4, 1933, I believe, unless one hears FDR's solemn and at times rather tense-sounding voice. Nor can one appreciate the intensity of the 1936 election without hearing Roosevelt give his famous speech in Madison Square Garden, where he said he welcomed the hatred of big business and others who opposed him.

b. Similarly, John Kennedy's way of speaking added interest and importance to the substance of his words. In interviews I conducted with him, he communicated much through the tone and inflection of his voice. I particularly recall the derogatory way in which he referred to his service in the House of Representatives and the Senate.

4. The utility of oral source materials to historians, biographers, political scientists and other scholars is attested to by the growing number of oral history libraries which have been established, many of which include actual recordings as well as transcripts. Scholars use oral source materials for historical authenticity—to clarify questionable phrases, to check on the accuracy of transcripts, and for other reasons.

5. The White House tapes played to the jury in *United States v. Mitchell* will be of particular importance to historians and biographers because of the peculiar nature of the conversations recorded. It will be recalled that when transcripts of these conversations were released, the conversations seemed somewhat disorganized, fragmented, discursive, jumbled. But it is well known that intelligible conversations may look unintelligible when reduced to formal transcript sequence. I believe that persons listening to the actual conversations would find them far more meaningful than would be possible just from perusing the transcripts. The recordings can capture the interplay of several personalities through means that cannot be made to appear on paper—timing, interruptions, simultaneous comments, communication of emotion through tone of voice, the emotional quality of responses.

6. Finally, there is the question of public confidence in the tapes. There has been considerable suspicion that the tapes have been tampered with, and that the transcripts are inaccurate. Making the recordings available

should help restore faith that at least on this score the government did a faithful job of transcribing. And it would be a healthy thing if government officials in the future—including stenographers—realized that members of the general public might have the right to check transcripts against recordings.

Further deponent sayeth not.

/s/James MacGregor Burns

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No.
74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF MAURICE A. CRANE

STATE OF MICHIGAN)
: ss.:
CITY OF EAST LANSING)

MAURICE A. CRANE, being first duly sworn, deposes and says as follows:

1. I am presently Director of Voice Library at the Michigan State University in East Lansing, Michigan. I am a social historian, a longtime professor of Humanities, and have an abiding interest in collecting oral sources for historians. I have a Ph.D. in English (Illinois, 1953).

2. My predecessor at the Michigan State University Voice Library was G. Robert Vincent, the radio, television recording and motion picture pioneer. He was the inventor of the V-Disc, the chief sound engineer at both the Nuremburg Trials and the United Nations, and an associate of Thomas Edison.

3. We all know that between the actual utterance and the transcript there is frequently a flurry of editing, so the grammar is cleaned up, factual errors are corrected, and, in journals, bracketed phrases like "sustained applause" introduced.

4. Americans have recently seen dramatic examples of the inability of a written transcript to body forth a human situation; and historians, amateur and professional, will become progressively less willing to accept the transcript filtered through typist and editor when the unfettered primary source material is available.

5. As historians we should bend all our effort, especially in precedent-making cases, to impress the general public with the superiority of the tape and all others for whom inflection serves an exponent to enlarge the value of diction, and sometimes supply meanings which are unclear or unavailable in words themselves.

6. As Voice Librarian, I support wholeheartedly all efforts to make available to scholars any and all materials which have already been made public in a significant way in courtrooms or elsewhere.

/s/Maurice A. Crane

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF WILLIAM J. EATON

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

WILLIAM J. EATON, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of the *Chicago Daily News*, and have held that position for nine years. I have been a professional journalist for twenty years.

2. In the course of my work for the *Chicago Daily News* I attended and reported on the Watergate cover-up

trial, *United States v. Mitchell, et al.* While attending the trial I heard the tape recordings that were received in evidence and played to the jury. On the basis of hearing several of the tapes, I wrote, and published in the *Chicago Daily News* on Tuesday, October 22, 1974, the article attached to this affidavit as Exhibit A. The statements in that article are true and accurate.

Further deponent sayeth not.

/s/William J. Eaton

[Verification Omitted in Printing]

Article from *Chicago Daily News,* Tuesday, Oct. 22, 1974 (Exhibit A)

"How the Watergate tapes sound"

by William J. Eaton, of our Washington Bureau

WASHINGTON—It is an eerie feeling, hearing the expletives from Richard M. Nixon and others that were deleted from the printed versions of his famous White House tapes.

From high-fidelity headsets provided at the Watergate cover-up trial comes Nixon's menacing tones to two of his confidants in the Oval Office:

"I want the most comprehensive notes on all of those that have tried to do us in . . . They are asking for it and they are going to get it . . . We haven't used the Bureau (FBI), and we haven't used the Justice Department, but things are going to change now."

Nixon's vow to take revenge on his political opponents was made on Sept. 15, 1972—nearly two months before his landslide re-election to a second term—in a conversation with H.R.Haldeman, his chief of staff, and John W. Dean, the young counsel at the White House.

His words as President were made public six months ago when he published transcripts of some of his taped discussions. But the words alone do not reveal the tone of cold fury in which Nixon denounced his enemies.

Speaking of Washington lawyer Edward Bennett Williams, for example, Nixon is enraged: "I think we are going to fix the son-of-a-bitch. Believe me. We are going to."

For the first time last week, reporters and a few dozen members of the public heard the harsh inflections in Nixon's voice as some of his White House tapes were played in the Watergate trial.

Many aspects of Nixon's personality were evident to those of us who listened to the tape. By turns he was soft-spoken, demanding, questioning, light-hearted, authoritative, puzzled.

Unless presiding Judge John J. Sirica reverses himself, however, only a relative handful of Americans ever will hear the recordings that toppled a President for the first time in history and may help convict some of his top aides of a cover-up conspiracy as well.

Sirica rejected requests by radio and television networks to obtain copies of the tapes introduced into evidence so they could be broadcast to the nation and the world.

As a result, only the 250 people who squeeze into the courtroom have been able to listen in on presidential conversations as if they were eavesdropping outside the Oval Office.

Hearing the voices gives a greater sense of reality, and in print to be disjointed fragments turns out to be the way people talk, in stops and starts.

There are mysterious sounds on some of the tapes. Clanking noises that seem to be deliberately made, for example, rouse suspicions of tape-tampering. Other background sounds are more normal—a chattering typewriter, a police siren and the clatter of coffee cups.

Tapes recorded in the President's office in the Executive Office Building were much noisier than those made in the Oval Office. The EOB tapes had a background hiss, clanking and whooshing noises.

But the President's voice came through clearly as he said, to his former Atty. Gen. John N. Mitchell on March 22, 1973:

"I don't give a shit what happens. I want you all to stonewall it, let them plead the Fifth Amendment, cover up or anything else, if it'll save it—save the plan."

Perhaps the most suspicious part of the famous March 21, 1973, tape is a long, nine-second silence right after Nixon says of Watergate conspirator E. Howard Hunt's blackmail demand: "I mean, it's not easy to deliver, but it is easy to get."

On the lighter side, Nixon clearly is making a jest when he tells campaign chairman Clark MacGregor over the telephone: "Don't bug anybody without asking me, OK?"

And he and Haldeman roar with laughter when they inform Dean in that Sept. 15, 1972, conversation that the late President Johnson had bugged Hubert H. Humphrey, his vice president and Democratic contended for President in 1968.

"Oh, God damn," Nixon says, unable to contain his laughter, although he angrily charged that Johnson had bugged his campaign plane in 1968 as well.

And Nixon inexplicably chuckles when he tells Dean to pretend that secret payments to Watergate defendants

were made through a Cuban defense fund, saying: "I would certainly keep that (laughter) that cover for whatever it's worth."

But, at least to this reporter, he seemed genuinely surprised to hear Dean say on March 17, 1973, that the White House directed the burglary of a psychiatrist's office to get records of Daniel Ellsberg, the distributor of the top-secret Pentagon Papers.

"Why?" Nixon asks in a hushed voice. "This is the first I ever heard of this." Four days later, again discussing the Ellsberg break-in, Nixon says angrily: "I don't know what the hell we did that for."

And he appears most compassionate when he comments on the death of Hunt's wife in a plane crash: "Great sadness," Nixon says with a sigh.

His controversial March 21, 1973, remarks about the payment to Hunt and other defendants, however, are matter-of-fact as if they were discussing the weather forecast.

"It is going to require approximately $1 million to take care of the jackasses that are in jail," Nixon tells Haldeman. "That could be, that could be arranged." Later, he adds in authoritative tones: "First, you've got the Hunt problem. That ought to be handled."

But Nixon, while reconciled to some additional cash for Hunt to "keep the cap on the bottle," is emphatic in rejecting clemency that would involve him personally in releasing Hunt and others from jail: "No it's wrong. That's for sure."

While the tapes are playing, almost everyone in the courtroom listens intently. Haldeman, whose words have come back to haunt him, has seemed dejected. Occasionally, he places a finger over his lips as if he wished he could silence his high-pitched, boyish voice.

Discussing White House troubles in making secret cash payments, Haldeman says on one tape: "We are so God damned square that we'd get caught on everything."

Nixon's determination to conceal links to the bugging of Democratic headquarters by his campaign aides and White House officials is a continuing theme.

In evaluating a plan to seek a new grand jury investigation, he seems enthusiastic at first but then thinks what might happen if everyone told what they knew:

"God, we can't risk that," Nixon says with concern in his voice. "I mean, uh, all sorts of shit'll break loose there."

And on the day that Nixon said he was ordering an investigation of the cover-up, he tells Dean in self-damning words:

"I have no doubts about the right plan before the election. You handled it just right. You contained it. Now after the election we've got to have another plan, because we can't have for four years, we can't have this thing—you're going to be eaten away."

The President proved prophetic. When he lost his fight to keep the telltale tapes a secret, Nixon was forced to resign the Presidency. Now, Dean, who "contained it," is a chief prosecution witness at the trial of others accused of conspiring to do the same.

The tapes, twisting slowly on their reels, are providing strong electronic evidence of an Oval Office conspiracy.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF GLEN ELSASSER

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

GLEN ELSASSER, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of The *Chicago Tribune*, and have held that position for 6 years. I have been a professional journalist for 18 years.

2. As a reporter for *The Chicago Tribune*, I attended and reported on the Watergate cover-up trial, *United States v. Mitchell, et al.* I heard most of the tape recordings that were received in evidence and played to the jury, and I have read the transcripts of the recorded conversations.

3. On the basis of hearing the tapes that were played to the jury and reading the transcripts of the same conversations that appear on the tapes, I believe that the

tapes add a new and significant dimension to one's understanding of the recorded and transcribed conversations.

4. The accuracy and reliability of the prosecution's transcripts of the taped conversations are not beyond question. During the trial, lawyers for H. R. Haldeman repeatedly challenged the accuracy of the transcripts. Alexander Butterfield testified that they contained numerous errors. Scholars and members of the public can resolve questions of accuracy for themselves only by listening to the tapes, and, probably, only by listening to some of the tapes more than once.

5. Very often on the tapes meaning is expressed by means other than words—*e.g.*, laughter, nuances of voice, pauses, and non-verbal utterances such as "uh huh." Many ambiguities of meaning in the transcripts are removed by the recordings.

6. Listening to the tapes clarified for me a number of issues which the transcripts left unresolved. I will give three examples.

a. In the transcripts it often is unclear whether Mr. Nixon is a dominant or passive personality in his dealings with Haldeman, Ehrlichman and Dean. On the tapes he is clearly in charge, and is not at all passive, at least until April 1973. Haldeman, Ehrlichman and Dean clearly were following his orders.

b. In the March 21, 1973 conversation in which John Dean warns Mr. Nixon of the growing cancer on the Presidency, Mr. Nixon and Dean discuss many aspects of the Watergate situation. After the first transcript of that conversation was released, Mr. Nixon argued that he was merely seeking information from Dean in order to find out what was happening. However, the tape recording of that conversation leaves it beyond doubt that Mr. Nixon

was not merely seeking information, but was trying to further the cover-up and "containment" of the Watergate scandal.

c. In a conversation on January 8, 1973 Mr. Nixon and Charles Colson discuss the payment of money to the Watergate burglars who were then going on trial. At one time it was argued that the purpose of such payments was humanitarian. The tape of the conversation makes it absolutely clear that the purpose was continuation of the cover-up, not humanitarianism.

7. Finally, I believe I felt the horror of Watergate most vividly when I heard the President of the United States, in a June 23, 1972 tape, refer to Watergate as "that scab," and say that it should not be investigated further because many detrimental things would be brought to light.

Further deponent sayeth not.

/s/Glen Elasser

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS, INC.

AFFIDAVIT OF CAROL H. FALK

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

CAROL H. FALK, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of the *Wall Street Journal*, and have held that position for five years. I worked for the *Wall Street Journal* for six years. Since November 1973 I have reported principally on the Watergate scandal, with particular attention to news developments concerning the transcripts and tape recordings of conversations in the White House. I attended the Watergate cover-up trial, *United States v. Mitchell, et al.*, listened to the tape recordings that were played to the jury, and read the transcripts of the recorded conversations.

2. During the months that I have chronicled developments in the Watergate scandal, there has been very

considerable controversy over the White House conversations relating to Watergate. President Nixon released his own transcripts of some of those conversations and gave public explanations of the meaning and intent of what he said in the transcribed conversations. The House Judiciary Committee debated conflicting interpretations of numerous critical passages in the transcribed conversations. During the cover-up trial there was much dispute over the accuracy of the prosecution's transcript of the conversations. For example, John Ehrlichman filed on October 22, 1974 a 44-page memorandum of proposed corrections in the prosecution's transcript. As I listened to the tape recordings in the courtroom, I noted numerous minor discrepancies between the wording of the prosecution's transcript and what I thought I heard on the tape recording; but, of course, I heard the tapes only once, whereas the prosecutors had the opportunity to listen to the tapes many times.

3. Because of the importance of the tapes to the entire Watergate affair, and because of the longstanding controversy concerning the meaning of the White House conversations, I believe that the American people should have the opportunity to hear the tapes for themselves, to study them, and to reach their own conclusions about the statements, decisions, and motives of the participants in those conversations. The public will learn far more from the tapes than they have learned from the published transcripts. For example:

a. In many places, the transcripts note the occurrence of laughter. But the laughter, as it actually is heard on the tapes, conveys a variety of meanings and emotions--the laughter sometimes sounds sardonic, or sarcastic, mean or bitter; sometimes it seems to express genuine good humor. The tone and character of the laughter adds much to the meaning of what people on the tapes are saying.

b. Pauses occur in many places on the tapes, some of them noted on the transcripts. But even when they are noted, the length of pauses is not indicated. On the tapes, the pauses vary enormously in length. Sometimes they are quite expressive: a short pause and quick response tend to suggest confidence, decisiveness; a long pause tends to suggest uncertainty, indecisiveness, a loss of words.

c. The transcripts do not indicate emphasis, and thereby omit some elements of meaning. For example, in a conversation on March 22, 1973, Mr. Nixon and H. R. Haldeman discuss the possibility that Charles Colson had promised clemency to E. Howard Hunt. At one point, Haldeman says: "But if Hunt thinks that's what he's been promised . . ." "He'll shut up now", continues Mr. Nixon. Haldeman responds: "He'll, he *may* shut up now," with an emphasis on "may." As I heard the tape, it was my impression that the emphasis on "may" expressed a belief that Hunt might very well *not* shut up. That suggestion is important in interpreting Mr. Nixon's subsequent comments. Other listeners might interpret Haldeman's comment differently. Members of the public should be able to hear the tapes and judge for themselves what Mr. Haldeman and Mr. Nixon were communicating to one another.

d. In a telephone conversation between Charles Colson and Hunt, Colson repeatedly asks Hunt to say no more about Watergate, and Hunt repeatedly tries to involve Colson by giving him pieces of information. Colson's expressive voice and the pace of his pleas to Hunt impressed me with the fact that he was trying desperately to end the conversation without alienating Hunt, and that Hunt was making it difficult for him to do so. The tape captures the interplay between these two personalities far better than the transcript can.

e. In a late afternoon conversation on April 25, 1973, Mr. Nixon and Mr. Haldeman discuss possible explanations of Mr. Nixon's March 21, 1973 conversation with John Dean. At several points, Mr. Nixon's voice indicates despair at the apparent impossibility of providing an innocent explanation of statements he made to Dean. Each time, Haldeman makes a reassuring suggestion that revives Mr. Nixon's spirits. From the transcript of that conversation, one cannot be sure of the extent to which Mr. Nixon and Mr. Haldeman sincerely believe the explanations they discuss. The tape is certainly a far better basis on which to make an evaluation. The public should be able to hear the tape and judge for itself.

f. Finally, I was struck by the matter-of-fact tone in which participants in the White House conversations, at least until April 1973, discussed almost incredible decisions and courses of action. The tone of their voices and the pace of their conversation communicated to me a belief on their part that they could rationalize and justify their actions, and that no one would successfully challenge them. How much the participants genuinely understood that they were engaged in wrongdoing, and how much they sincerely believed that their actions were morally justified is an extremely difficult matter to assess. But I believe it is important that the American people have the best evidence to make that assessment, so that they can understand and perhaps guard against the kind of reasoning that produced the Watergate cover-up.

Further deponent sayeth not.

/s/Carol H. Falk

[Verification Omitted in Printing]

AFFIDAVIT OF JOHN HOPE FRANKLIN

1. I am John Hope Franklin, John Matthews Manly Distinguished Service Professor of History at the University of Chicago. I received the A.B. degree at Fisk University and the M.A. and Ph.D. degrees at Harvard University. I am the author of several books in United States history, among which are *From Slavery to Freedom, A History of Negro Americans; Reconstruction After the Civil War;* and *The Militant South.* I am co-author, with John W. Caughey and Ernest R. May, of *Land of the Free,* a history of the United States for junior high schools, and co-editor, with Isadore Starr, of *The Negro in Twentieth Century America.* I am President of the Organization of American Historians and of the United Chapters of Phi Beta Kappa. I have served on the Advisory Committee of the Oral History Project, and as chairman of the Committee on Television of the American Historical Association. I served on the Board of Foreign Scholarships for seven years and was its chairman from 1966 to 1969. In 1973 I served as Lincoln Lecturer for the Department of State in South America, the South Pacific and Southeast Asia.

2. I have used oral source materials collected by such institutions as Fisk University and Columbia University and have found them invaluable aids in my research and teaching. I have also worked closely with the staff members of the Civil Rights Documentation Project during the time that I served on the Project's Advisory Council; and I was one of the members who urged that primary consideration be given to the collection of oral source material. I have supervised the work of several doctoral candidates who have relied heavily on oral source materials, without which their dissertations would have suffered considerably. Indeed, one of them became so deeply committed to such materials that she has

established an oral history project at Roosevelt University where she teaches. I am now writing the biography of George Washington Williams, a nineteenth century Negro American historian, who as early as 1880 supplemented his research in manuscripts with an extensive use of oral sources. Without such sources he would have been unable to write his historical works and I would be unable to make the evaluation of his work as an historian that I am now able to make.

3. I have read much of the printed transcripts of the Nixon tapes that were played in the Watergate cover-up trial. While they are of immense value to historians interested in such matters, they are *no substitute* for the tapes themselves. The transcripts fail to convey the tone of voice, the emphases on certain words and phrases, and the pauses and other qualities of speech that only the tapes themselves can convey. For example, some of the statements in the transcript may give the impression that they were declarations when, as a matter of fact, the inflections indicate reservations that place doubts on their status as unequivocal declarations. Other statements contain pauses and other evidences of hesitation that cause one to question the certainty that the printed transcripts indicate. No printed transcript is or can be a substitute for the obligation of the historian or some other investigator to make certain judgments for himself regarding the real meaning or significance of the statements that were made.

4. The Watergate trials were, in a sense, a test of the American public's capacity to grasp the full significance of what had transpired at the very highest level of our government. Even in the aftermath of the trials the public cannot know what actually transpired and, thus, cannot reach a satisfactory resolution of the issues involved without access to the same materials, including the tapes,

to which the jury itself had access. Free access to the tapes and their free dissemination among interested persons would contribute greatly to the public understanding of the administration of justice at this unusual juncture in our history. The people will decide such matters for themselves; and if their decisions are based on all available evidence they are more likely to reach a sound decision than they would if certain material evidence were denied them.

/s/John Hope Franklin

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF HAYS GOREY

DISTRICT OF COLUMBIA)
: ss.:
CITY OF WASHINGTON)

HAYS GOREY, being first duly sworn, deposes and says as follows:

1. I am a correspondent in the Washington Bureau of Time Magazine. I have held that position for approximately ten years and have been a professional journalist for approximately twenty-five years. I report on politics and government, and covered the 1968 and 1972 Presidential campaigns for Time Magazine.

2. For more than two years I have reported on all aspects of the Watergate scandal. I covered the break-in trial, the trial of Dwight Chapin, and the recent cover-up trial (*United States v. Mitchell, et al.*). I attended the cover-up trial during the entire period when tape recordings were being played to the jury, except for part of one day.

3. During the course of my attendance at the cover-up trial, I listened to virtually all of the tape recordings that were received in evidence and played to the jury. I also have read the transcripts of those recordings.

4. On the basis of listening to the tape recordings and reading the transcripts, I believe that the recordings provide very important elements of meaning which are not available from the transcripts, and that listening to the recordings is indispensible for a full understanding of the recorded conversations. The following examples illustrate the kind of understanding which can be gained only by listening to the recordings.

a. Phrases like "uh-huh," and "um-hum," appear throughout the recordings and the transcripts. In the transcripts, they are all the same, or nearly the same. In

the recordings, those expressions are vastly different: an "um-hum" in one context, and said with one tone of voice, can mean mere acknowledgement of an idea or a proposal; in another context and said in another tone of voice, it expresses surprise, or determination, or acceptance or rejection. I recall that on one occasion during the trial there was a serious clash between John Ehrlichman and James Neal over whether a particular "uh-huh" uttered by Ehrlichman during one of the taped conversations signified acceptance or rejection of the idea being discussed. A reader of the transcripts simply could not tell; but a person who listened to the tape could easily decide that on that occasion Mr. Ehrlichman's "uh-huh" unmistakably signified acceptance.

b. At many points on the tapes, while one person is speaking, another will be heard to speak at the same time. A person listening to the tape hears the first speaker without interruption, and notes a simultaneous comment by another person. The transcripts, however, do not present simultaneous speech. They break the flow of the first speaker's sentences to interject the simultaneous utterances of the second speaker. The result is that a reader has a much more difficult time understanding what is being said, and it may even be impossible for him to reconstruct exactly which comment was a response to which, which comments interrupted the conversation and which were uttered simultaneously, and which comments were part of the general flow of the discussion and which were mere asides.

c. Often, the transcripts don't make clear whether a statement is made or an instruction is given tentatively or forcefully. For example, in the March 22, 1973 tape, Mr. Nixon tells John Dean to go to Camp David. It is clear from the tape recording that Mr. Nixon was giving a firm instruction, whereas from the transcript it might appear that he was making a tentative suggestion.

d. The conversations among Mr. Nixon and his associates were filled with what they called "scenarios," that is, enactments of possible scenes, test runs of possible combinations of statements. On the tape recordings, these "scenarios" are clearly separated from normal conversation by changes in tone of voice and inflection. However, in the transcripts it is difficult in many instances to decide whether a particular piece of conversation is part of a scenario or is normal discourse.

e. The transcripts distort the role of Mr. Nixon. They make him appear very tentative and unsure of himself, and they give the impression that his associates were pushing him around. By contrast, on the tape recordings, Mr. Nixon sounds firm and very much in control, at least until sometime in April, 1973. From that point on, the tapes record a number of late night conversations between Mr. Nixon and Haldemann and Colson as to ways of dealing with the fact that Magruder and Dean were talking to the prosecutors. In those conversations, Mr. Nixon sounds very much like a man who is deeply worried. These variations in Mr. Nixon's voice (and the variations in the state of mind it reflects) cannot be communicated in the transcripts.

Further deponent sayeth not.

/s/Hays Gorey

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF RICHARD S. KIRKENDALL

STATE OF INDIANA)
: ss.:
CITY OF BLOOMINGTON)

RICHARD S. KIRKENDALL, being first duly sworn, deposes and says as follows:

1. I am Professor of History at Indiana University and also Executive Secretary of the Organization of American Historians. In addition, I am Director of the Oral History Project at Indiana University and a former president of the Agricultural History Society. I moved to my present positions in 1973 after receiving the Ph.D. from the University of Wisconsin in 1958 and serving from 1955 to 1958 as a member of the history department at Wesleyan University and from 1958 to 1973 as a member of the history department at the University of Missouri-Columbia. I am the author of numerous articles and reviews and of three books: *Social Scientists and Farm Politics in the Age of Roosevelt*

(University of Missouri Press, 1966), *The Global Power: The United States Since 1941* (Allyn and Bacon, 1973), and *The United States, 1929-1945: Years of Crisis and Change* (McGraw-Hill, 1974). I am also the editor of three books: *The Truman Period as a Research Field* (University of Missouri Press, 1967), *The New Deal: The Historical Debate* (John Wiley, 1973), and *The Truman Period as a Research Field: A Reappraisal, 1972* (University of Missouri Press, 1974). I am at work on a multi-volume biography of Harry Truman which I began more than a decade ago and regard as a lifetime project, and my most pressing writing responsibilities now are book-length manuscripts on "Missouri in Modern Times," which is scheduled for publication by the University of Missouri Press in the near future, and "The Early Life of a Global Power: The United States in the Truman Years," which is under contract for publication by Indiana University Press in 1976.

2. I have used oral sources of history in my work on social scientists and in my study of Harry Truman. I have interviewed the people involved, have used interviews with them prepared by oral historians, have listened to speeches and conversations by Truman and other historical personalities, and have listened to recordings of their speeches and watched films on aspects of their lives and careers. I have used these materials both to gain access to evidence that is not available in the written record and to gain greater understanding of the evidence the written record contains. The opportunities to hear their views as well as to witness ways in which they lived portions of their lives have added greatly to my understanding of these people. As a biographer with a strong interest in personality, I would stress the value of oral materials for the contributions they can make to an understanding of the personalities of significant historical figures.

3. A recent opportunity to prepare the written commentary for a recording of Truman speeches and remarks provided a fresh illustration for me of the value of oral materials. The recording supplied important insights into the complexity of the man. Students who use the record will hear him behaving in a variety of ways and will be encouraged to reject simple conceptions of him such as one finds in *Plain Speaking*. The record also supplied, to cite another example, insight into the sense of accomplishment that Truman had when he left office. Students hearing that will, I expect, be more likely to explore the reasons for that sense of accomplishment than they would be if they only read that he felt that way in 1953.

4. The value of the Nixon tapes seems especially obvious. The transcripts seem to be filled with ambiguities; interpretation of the transcript is often very difficult, certainly much more difficult than interpretation of a speech or a carefully dictated letter or memorandum. Historians reading the transcripts will frequently feel compelled to turn to the tapes for help in determining the meaning of recorded remarks. If those steps are taken, then we will gain much greater understanding of the workings of the Nixon White House than we can obtain of any other presidency.

/s/Richard S. Kirkendall

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF FINLAY LEWIS

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

FINLAY LEWIS, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of *The Minneapolis Tribune*. I have been a professional journalist for more than ten years, have been a reporter for *The Minneapolis Tribune* since 1966, and have served in its Washington Bureau since 1972.

2. As a reporter for *The Minneapolis Tribune*, I have covered virtually all aspects of Watergate, including the break-in trial, the Ervin Committee hearings, the hearings in this Court on the subpoenas for and custody of the White House tapes, the impeachment proceedings in the House Judiciary Committee, and the recently concluded cover-up trial. I attended the trial regularly, listened to

almost all of the tape recordings that were received in evidence and played to the jury, and read the transcripts of the recorded conversations.

3. On the basis of hearing the tape recordings that were played to the jury and of reading the transcripts of those recordings, I firmly believe that the recordings make a unique and significant contribution to an understanding of how the cover-up occurred and of the impact of Watergate on the Office of the Presidency and on President Nixon. Listening to the tapes provides an absolutely vital insight into the Watergate affair that cannot be obtained by simply reading the transcripts.

4. The first tape played to the jury was the recording of a conversation in the Oval Office on September 15, 1972. At that time Mr. Nixon was at the peak of his power: he was looking forward to a re-election landslide, and that very day the federal grand jury indicted seven low-level operatives in the Watergate break-in, suggesting that the scandal had successfully been contained. I vividly recall my reaction on hearing that tape, because it was my first opportunity to hear Mr. Nixon without the trappings and formality of a public appearance. The tape revealed the private Nixon, seemingly secure in the power and secrecy of the Oval Office. I was struck by the assertiveness of Mr. Nixon's voice. The tape presented him as an impressive individual—very smart, forceful, quick in responding, and very much in control. I was surprised at the rapid pace of his conversation, at his strength, and at his sure grasp of the situation presented to him. The performance on the tape was also chilling. When Mr. Nixon said he would use his power to harm his "enemies," one could tell from his voice that he was deadly serious, and meant exactly what he said.

5. I was also struck by the contrast between the September 15, 1972 tape and tapes from April 1973. By

April, the self-confident Mr. Nixon of September had disappeared, and had been replaced by a man who was disoriented, unsure of himself, and not fully in control. The contrast is captured on the tapes, and really cannot be derived from the transcripts.

a. The tape of a telephone conversation on April 14, 1973 between Mr. Nixon and H. R. Haldeman presents Mr. Nixon stumbling over his words, breathing heavily, with fatigue and tension in his voice. At this stage, he plainly is not in control, but is subject to the initiative and suggestions of Mr. Haldeman.

b. On April 25, 1973, the tape of a late evening telephone conversation between Mr. Nixon and H. R. Haldeman shows a frightened President. His mood shifts rapidly from dark pessimism to exuberant optimism, to aggressive militancy, to composure and stoical fatalism. These shifts are expressed much more by his voice than by his words. To me, this tape revealed something about how Watergate got out of Mr. Nixon's control. He had neither a consistent understanding of what was happening or what was at stake, nor a consistent emotional response to developments. Consequently, he was unable to formulate and execute a consistent strategy to deal with Watergate. His response to Watergate developments was to vacillate between compliance and resistance to demands for disclosure, and between loyalty to and separation from his aides and associates. That response was a product of the emotions that are captured on the April 25 tape. It was the last tape which the prosecution played to the jury, and it summed up the impact of Watergate on Mr. Haldeman, on Mr. Nixon, and on the Presidency.

6. On the tape of a March 21, 1973 conversation, Mr. Nixon and John Dean discuss the payment of hush money to E. Howard Hunt, Jr. At one point, Mr. Nixon

says to Dean: "For Christ's sake, get it." The interpretation of that statement was the subject of considerable debate within the House Judiciary Committee, which was relying on the transcript of the conversation rather than on the tape recording. But when one hears Mr. Nixon making that statement on the tape, it becomes clear that he is giving Dean a direct order to get hush money for payment to Hunt. The tape removes the ambiguities of the transcript.

7. In many instances, the conversations in the transcripts seem not to lead anywhere. The participants return to the same subject over and over again. The transcripts do not make clear when something has been decided. However, a person listening to the tapes can tell from the tone of voice of the speakers when a decision has been made, in contrast to leaving a subject inconclusive.

8. The transcripts are confusing. They attempt to mirror living conversations. Since we do not really know the non-public personalities of the participants, it is very difficult for readers to reconstruct the conversations from the transcripts alone. The tapes make much more sense. Disjointed phrases, which do not match up with one another when read, do match up when heard. The total conversations have meaning and direction when they are heard.

Further deponent sayeth not.

/s/Finlay Lewis

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF ARTHUR LINK

STATE OF NEW JERSEY)
: ss.:
CITY OF PRINCETON)

ARTHUR S. LINK, on his oath, deposes and says:

1. I am a historian, writer, editor, and Edwards Professor of American History at Princeton University, where I also serve as Director of the Woodrow Wilson Project and Editor of *The Papers of Woodrow Wilson.*

2. I have taught at various times since 1943 at North Carolina State University, The University of North Carolina, Northwestern University, as well as at Princeton. I was the Harmsworth Professor of American History at Oxford University, 1958-59, and have lectured in various colleges and universities in this country, South America, Europe, and Japan. I won the Bancroft prize for the best work in American biography in 1957 and 1961. I was President of the Southern Historical Association,

1968-69, and have served as a member of the National Historical Publications Commission, the Executive Council of the Organization of American Historians and of the Board of Editors of *The Journal of American History* and *The Journal of Southern History*. I am also a member of the American Philosophical Society and the American Academy of Arts and Sciences, as well as a Fellow of the Society of American Historians.

3. Although my major scholarly work has been on Woodrow Wilson, I have taught American history in the twentieth century since 1943 and am the co-author of a widely used textbook covering all phases of American history from 1900 to 1972. The name of this textbook is *American Epoch*, and it is published by Alfred A. Knopf, Inc. of New York. The fourth edition of this book was published in 1973.

4. In my work on Woodrow Wilson and twentieth-century American history, I have used a number of presidential collections extensively. It is no exaggeration to say that one cannot write anything like a reliable history of a presidential administration without access to the papers of the President involved. Otherwise, it is very difficult, indeed usually impossible, to determine the President's sources of information, the processes leading to presidential decisions, and the relations between a President and his subordinates, the Congress, public opinion, etc.

5. It is my opinion that a comprehensive edition of the conversations on the so-called Nixon tapes is absolutely essential for any kind of scholarly work on the Nixon administration. We have already seen enough transcripts of these tapes to know that it will be impossible to do any serious work in the Nixon period without access to the tapes, and a comprehensive edition of them prepared according to the modern canons of

scholarship would be an enormous boon. Speaking personally, my collaborator and I would certainly use them extensively in preparing the next edition of *American Epoch*.

6. The Nixon tapes are oral history of a particularly valuable kind. Oral history, as it is commonly understood, consists of tapes or transcripts of conversations with individuals who played significant roles in the past, and who, years later, have reminisced about themselves, other persons, and events. The evidence on the Nixon tapes, on the contrary, is of a very different nature. It obviously consists of the actual conversations of a President with members of his staff and others over an extended period. Insofar as I know, such evidence is unique in the history of presidential administrations.

7. The fact that President Nixon himself caused a bowdlerized version of the conversations on the so-called Nixon tapes makes it all the more necessary for historians to have easy access to a reliable comprehensive edition.

/s/ARTHUR S. LINK

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF H. WAYNE MORGAN

STATE OF OKLAHOMA)
: ss.:
CITY OF NORMAN)

H. WAYNE MORGAN, on his oath, deposes and says:

1. I have been Professor of History at the University of Oklahoma, Norman since 1972. I have also taught at San Jose State College, San Jose, California (1960-1961), and at the University of Texas at Austin (1961-1972). I received my Ph.D. from the University of California at Los Angeles in 1960.

2. I am the author of several books dealing with the history of the United States between the Civil War and World War I. They include:

William McKinley and His America (Syracuse University Press, 1963).

America's Road to Empire: The War With Spain and Overseas Expansion (John Wiley and Sons, 1965).

From Hayes to McKinley: National Party Politics, 1877-1896 (Syracuse University Press, 1969).

Unity and Culture: The United States, 1877-1900 (Penguin Books, 1971).

3. My major concern as a historian to date has centered on politics and diplomacy at the presidential level during the late nineteenth century, especially the McKinley administration. The records for that administration are not voluminous, and analyzing decisions made during that period (1897-1901) is especially troublesome to scholars. Some of these decisions have had international as well as national, and long-lasting as well as topical importance. I have in mind especially the decision-making process which took the United States into war with Spain in 1898, and the development of the administration's decision to acquire the Philippine Islands as a result of that war in 1898-1899. The evidence for this last decision is very sketchy, and the subject of much controversy among historians. Some believe the decision part of a conscious desire to expand American power overseas, especially in relation to China, with long-lasting results. Other scholars see the decision as an unexpected result of the war, which the administration was not eager to make. The sources for both the thinking of President McKinley, the key actor in this drama, and for his advisers are sketchy. I can think of no case in American history where verbatim records of the discussions involved would be of greater service to the historian.

4. After several years of research in political and diplomatic materials, I am thoroughly convinced of the value of sound recordings and visual evidence, used in conjunction with literary records. Much of the decision-making process involves tone, nuance, and suggestion,

things which do not always emerge clearly in written records. I am confident that if sound recordings could have been made during the McKinley administration, relating to the problems I have outlined above, historical judgments would be much more final and satisfying.

5. As a citizen and as a scholar, I believe that the public, both for current and historical reasons, are entitled to know the reasons behind governmental decisions which affect their lives and fortunes. I am confident that sound recordings, in addition to transcripts, add a whole new dimension to the public record, and that the public and posterity are entitled to know what that full record is.

/s/H. Wayne Morgan

[Verification Omitted in Printing]

APPENDIX P

Memorandum Opinion and Order

of Judge Sirica, dated

April 4, 1975

(located at 29a-34a of Petition for Certiorari)

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1510

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et al.,
WARNER COMMUNICATIONS, INC.,
Appellant,

MEMORANDUM OF POSITION OF APPELLEE
HARRY ROBBINS HALDEMAN

This appeal raises issues upon which appellee Haldeman took no position in lower Court. This appellee's position is that the tapes which appellant seeks to obtain and publish should not be made public for the reason that such publicity would seriously jeopardize this appellee's right to a fair trial in the event his pending appeal in Case No. 75-1381 results in a grant to him of a new trial.

/s/ John J. Wilson

/s/ Frank H. Strickler
815 - 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Appellee
Haldeman

[Certificate of Service Omitted in Printing]

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 75-1409 and 75-1410

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et al.

NATIONAL BROADCASTING CO., et al.

and

WARNER COMMUNICATIONS, INC.,

Appellants.

Appeals from the United States District Court
for the District of Columbia

MEMORANDUM FOR THE UNITED STATES

The United States submits this memorandum in connection with the consolidated appeals from the order of the district court denying appellants' applications for access to the tape recordings of Presidential conversations introduced into evidence in the trial of *United States v. Mitchell, et al.* (D.D.C. Crim. No. 74-110, *appeal docketed*, Nos. 74-1381-84, D.C. Cir. April 14, 1975), for the purpose of making copies of the recordings for re-publication to the public.

The sole interest of the United States in these appeals is to ensure that the defendants in *United States v.*

Mitchell, et al. receive a fair trial.* It is the belief of the United States that, because the recordings were played at trial and because transcripts of the recordings were published and extensively analyzed by the media at that time, there is little likelihood that re-publication of copies of the recordings in the future would preclude affording defendants a fair retrial in the event that the outstanding convictions were reversed. Nevertheless, since the extent of the dissemination of these tape recordings or the manner in which they will be reproduced and broadcast is entirely speculative at present, the government is unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial.

Respectfully submitted,

HENRY S. RUTH, JR.,
Special Prosecutor,

PETER M. KREINDLER,
Counsel to the Special
Prosecutor,

KENNETH S. GELLER,
Assistant Special
Prosecutor,

1425 K Street, N.W.
Washington, D.C. 20005

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* Although the Special Prosecutor represented the United States in the court below because the proceedings stemmed from a prosecution within his jurisdiction, see 28 C.F.R. §0.38, the issues presented in these appeals raise concerns relevant to the totality of the federal justice system. Accordingly, before determining the position of the United States in these appeals, the Special Prosecutor consulted with the Assistant Attorney General in charge of the Civil Division.

[Certificate of Service Omitted in Printing]

APPENDIX S

Opinion of Court of Appeals,

dated October 26, 1976

(located at 1a-27a of Petition for Certiorari)

APPENDIX T

Order of Court of Appeals

Denying Petition for Rehearing,

dated December 3, 1976

(located at 28a of Petition for Certiorari)

APPENDIX U

United States Court of Appeals

for the District of Columbia Circuit

[Caption Omitted in Printing]

Order

On consideration of the suggestion for rehearing *en banc* of respondent Richard Nixon, and a majority of the

judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied.

Dated: Dec. 3, 1976 *Per Curiam*

APPENDIX V

United States Court of Appeals

for the District of Columbia Circuit

[Caption Omitted in Printing]

Order

On consideration of the motion of respondent Nixon for stay of mandate, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a period of 30 days from the date of this order, and, it is

FURTHER ORDERED by the Court that during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution, in accord with this Court's opinion of October 26, 1976.

Per Curiam

Circuit Judge MacKinnon would not remand the record

Dated: Dec. 3, 1976

APPENDIX W

Record Group 267
Job No. NN369-89

GENERAL SERVICES ADMINISTRATION

Accession Inventory

Source: Supreme Court of the United States

Location: Supreme Court Building
1 First Street, NE
Washington, DC 20543

The following Accession Inventory is hereby agreed to by the undersigned duly authorized representatives of the agency named above and of the Archivist of the United States, respectively; and the records are accepted for deposit with the National Archives of the United States.

Description of Records: Audiotape recordings of oral arguments before the Supreme Court during the 1972 term. Tapes are numbered from 883-900 and 1-26. Special items include tape 889A Justice Harlan Memorial Service and tape 899A Justice James Byrnes Memorial Service. Note also that tape 900 has three reels and tape 1, 2, and 3 are composed of four reels each.

Restrictions on the Use of Records: (a) The tapes may be played for Federal personnel in connection with official duties and to the general public for serious scholarly and legal research. (b) Typewritten transcriptions of the oral arguments may be furnished to these persons at a fee provided that, in each instance, three copies of these transcriptions are deposited in the Library of the Court. (c) Copies of the tapes may not be furnished to persons other than the Justices without the permission of the Marshal of the Court, and unless three years shall have

expired since the argument of a recorded case. (d) The National Archives may not identify the voices of members of the Court in connection with any use of the tapes, either when they are being played or in making or furnishing transcriptions. (e) Copies of the tapes will not be reproduced for commercial purposes.

Executed in duplicate at Washington, DC., this 9th day of April, 1974 A.D.

/s/F. M. Hepler
Representing the Supreme Court
of the United States

/s/James W. Moore
Representing the Archivist
of the United States